IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. [redacted] 18

DAVID FRIEDBERG,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

PETITION FOR REHEARING

ROBERT N. GORMAN,
STANLEY A. SILVERSTEEN,
Attorneys for Petitioner,
808 Traction Building,
Cincinnati 2, Ohio.

THE JOHNSON & HARDIN CO., LAW PRINTERS
CINCINNATI, OHIO

CASES CITED

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PETITION FOR REHEARING

Petitioner's chief contention was that a conflict existed between the Courts of Appeal of various circuits on the question of what constitutes sufficient proof of income understatement, under the net worth method. The specific issue involved was proof of the starting point net worth. Petitioner pointed out that the Courts of Appeal for the Fifth Circuit (*Bryan* v. *United States*, 175 Fed. [2d] 223), and for the Seventh Circuit (*United States* v. *Fenwick*,

177 Fed. [2d] 488) require strict proof of the starting point net worth. The Courts of Appeal for the Ninth Circuit (*Remmer* v. *United States*, 205 Fed. [2d] 277), for the Eighth Circuit (*Schuermann* v. *United States*, 174 Fed. [2d] 397), and for the Sixth Circuit, in the instant case, permit the Government to establish the starting point net worth by prima facie proof, in an obvious attempt to facilitate tax collection. This shifting of the burden of proof in a criminal case, involving the liberty of the taxpayer, was roundly criticized by the Courts of Appeal for the Third Circuit (*Caserta* v. *United States*, 199 Fed. [2d] 905, 907), and for the Fifth Circuit (*Demetree* v. *United States*, 207 Fed. [2d] 892).

In denying the petition herein on March 8, 1954, this Honorable Court evidently concurred in the contention of the Government that it did "not agree with petitioner that there is a conflict among the Courts of Appeal as to how far the Government must go to establish a solid net worth starting point." (p. 14 of Brief in Opposition.)

Therefore petitioner is shocked to find that on February 4, 1954, the Solicitor General of the United States filed a petition for certiorari (*United States* v. *Calderon*, No. 577), wherein the contentions of the Government were synopsized as follows:

> ". . . (2) decision below is inconsistent in principle with holdings in other circuits that Government can make prima facie showing of income understatement without necessarily presenting evidence as to exact amount of cash on hand at starting point; (3) decision below constitutes substantial obstacle to effective enforcement of internal revenue laws." 22 U. S. Law Week 3218 (February 23, 1954)

In this petition (*Calderon*) the second contention of the Government is directly identical with the main contention in the instant petition. And the third contention is the

very principle which was decried in *Caserta* v. *United States*, *supra*, and *Demetree* v. *United States*, *supra*, as subordinating individual rights to governmental convenience.

Evidently the Government also now agrees that the conflict should be settled, and that the time has come for this Court to explain *United States* v. *Johnson*, 319 U. S. 503, and thus to bring uniformity to the trial of net worth tax cases.

Petitioner respectfully represents that the granting of certiorari in *United States* v. *Calderon*, *supra*, and the clarification of *United States* v. *Johnson*, *supra*, will have little significance to this petitioner, if such actions are taken after this petitioner has begun to serve his sentence. Petitioner respectfully submits that this Honorable Court should revoke its order of March 8, 1954, denying certiorari, and should grant certiorari, or should at least withhold decision on the instant petition until the Court disposes of *United States* v. *Calderon*, No. 577.

Respectfully submitted,

ROBERT N. GORMAN,
STANLEY A. SILVERSTEEN,
Attorneys for Petitioner,
808 Traction Building,
Cincinnati 2, Ohio.

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ROBERT N. GORMAN,
STANLEY A. SILVERSTEEN,
JAMES W. HENGELBROK,
Attorneys for Petitioner,
808 Traction Building,
Cincinnati 2, Ohio.

THE JOHNSON & HARDIN CO., LAW PRINTERS
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PETITION FOR REHEARING

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

While ordinarily this Court does not reverse itself, we believe when it is shown that this Court founded its decision on an erroneous premise, it will not hesitate to grant a rehearing. It is for the reason that we wish to point out in this petition that this Court misconstrued the instructions given by the trial court as well as giving improper inferences to the facts.

REASONS FOR GRANTING REHEARING

A. The Supplemental Instructions

The supplemental instruction of the District Court was that the jury should make "a sincere effort to compromise

and adjust" their differences, which the jury did shortly after receiving this instruction. This Court in its opinion found that this instruction was "unfortunate," and then ended the opinion by saying "we can hardly conclude this *error* is sufficient ground for reversal." (Emphasis added.)

The Court bases this conclusion on its statement that "we do not think it misled the jury," and on the fact that no objection was made to the charge. Actually the "thought" of the court that it did not mislead the jury is clearly erroneous. The jury was deadlocked during the second day of deliberation, unable to make a decision, when the court urged them "to compromise and adjust their differences." Within a short time they did just that by returning a verdict on the first count of not guilty (1944) and of guilty on counts 2, 3 and 4 (1945, 1946 and 1947). Realizing that the entire controversy was over the starting net worth, it is difficult to reconcile an acquittal for the year 1944 with the theory of the government. In a similar type of case Judge Yankwich refused to accept that type of compromise verdict. See *United States* v. *George L. Allen* (S. D. Cal.), Prentiss Hall, par. 72,784; 1950 C. C. H. 9494. The only possible way to justify the verdict is that it was a pure compromise, and the thought of the court that it did not mislead the jury is unsupported in every respect. Is this Court to uphold a compromise verdict merely because by some process of reasoning it thinks a supplemental erroneous charge might not have affected the verdict of the jury, when the facts point contrariwise?

The court also says that the "petitioner disclaimed any intent to make the instruction now attacked a ground for a new trial." That statement is not altogether accurate, and should read that "counsel for the petitioner" disclaimed any intent to make the instruction a ground for new trial. The motion for acquittal specifically predicated error on the improper instruction (R. 663), and then dur-

ing oral argument, counsel for petitioner foolishly abandoned the point.

However, even with this disclaimer by counsel, the trial court still apparently felt the instruction affected the verdict of the jury (R. 661-663). At the time of sentence the court said:

> "The case was well tried, it was well argued, and if *the Court committed any error in its instructions an upper court will have to determine that fact.*" (R. 667.) (Emphasis added.)

The only objection to the instructions raised in the motion for new trial was that against the supplemental instruction, which this Court now holds was erroneous, but such a holding still deprives the petitioner of his liberty.

The holding of this Court is reduced to the proposition that a lawyer can waive away his client's liberty by verbally withdrawing a clear specification of error. The danger of such a ruling, particularly when the trial judge expressed doubt and wanted it reviewed, is best illustrated in the argument made by George F. Vanderveer as set forth in *Counsel for the Damned* at pages 319-320:

> "However, a more suitable epitaph for George Vanderveer may have been a statement he made before the court, in a trial conducted some years before his death. A young Indian deck hand on one of the Puget Sound steamers had been convicted of the rape of a white woman and sentenced to death. Believing that the young man had lacked adequate legal representation in the lower court, practically an entire tribe had descended upon Vanderveer's office and demanded that he carry the appeal to the Circuit Court of Appeals in San Francisco. Vanderveer accepted the assignment and in his arguments in San Francisco he attempted to show that improper evidence had been admitted in the original trial.

> "One of the Justices on the Circuit bench halted Vanderveer in the midst of his arguments and pointed out that there had been no exception requested by the defense in the lower court and that thus there could be no charge of judicial error upon the point in question.
> "White with anger, Vanderveer demanded of the court: 'Would you hang a man because his lawyer failed to except to a ruling?'
> "Chief Judge Rudkin roared with laughter at the pointed irony of the barb, and a new trial subsequently was ordered. In the new trial, Vanderveer defended the young Indian and he was acquitted."

We submit just as the Indian should not be hanged for the mistake of his lawyer, neither should Friedberg be imprisoned because of a mistaken admission by counsel.

B. The Holding on the Starting Point Evidence in This Case and in the CALDERON Case

In the instant case, this Court found evidence from which a jury could reasonably have concluded that, prior to 1939, petitioner did not possess a large reserve of cash. The first indictment year was 1944; and, under the theory of the prosecution, it was impossible for petitioner to have any cash until the close of 1945 (Ex. 2, R. 691).

In *United States* v. *Calderon*, No. 25, this Court found proof that he was impoverished by the depression, "that he was working for his meals and $8 a week in 1935," and that he did not discontinue this job until 1939. The first indictment year was 1946, and the respondent there was credited with cash on hand at the close of 1944.

Up to this point in the evidence, it would appear that the two cases are identical. However, in *Friedberg*, a net worth conviction was found justified, while in *Calderon* the use of the net worth method was held unjustified (although other, independent, evidence did establish the crime directly). The two divergent holdings on the starting point

net worth, or cash, position, requires a close examination of the 1939-1945 evidence in both cases, to determine if this intervening evidence distinguishes the two cases sufficiently to justify such opposite results.

In *Friedberg*, the evidence for the period 1939-1945 was as follows:

1) Income tax returns for 1942, 1943, and for the indictment years of 1944-1947.

2) Certificate of Assessments and Payments, Income Tax, for 1939, 1940, 1941.

3) A *nulla bona* return in 1940 on a $13.76 judgment.

4) Corporate dissolution in 1941, and subsequent operation of business by petitioner as sole proprietorship.

In *Calderon*, the evidence for the same intervening period was:

1) Income tax returns for 1944 and 1945, as well as for the indictment years.

2) Income tax returns for 1941 and 1942, which respondent (Calderon) admitted (Br., p. 57) were offered by respondent.

3) As this Court found, "the records were shown to be incomplete."

4) Calderon started in business in 1935 with only two machines (R. 153-154), did not make a large investment in machines until 1946 (R. 64-65, 91, 164-165), and, as this Court found, "it was not until 1947, the middle of the prosecution period, that his business became sufficiently large to require the full time of his accountant."

Friedberg had always earned over $50.00 per week; Calderon worked "for his meals and $8 a week" until 1939. However, on the 1939-1945 evidence just related, this Court held that the net worth method in *Friedberg* could sustain a conviction, but that the net worth method in *Calderon* could not sustain a conviction.

Petitioner respectfully represents that the two holdings are inconsistent, and that the evidence in *Friedberg* was not sufficient to permit the jury to employ the net worth method. This last conclusion is buttressed by the absurd finding which is forced upon the jury by the net worth method as used in 1947. From September 25, 1947, the petitioner knew that he was being investigated for income tax deficiencies (R. 407 et seq.). He did not file his 1947 return until January 15, 1948, four months later (Ex. 1-E; R. 680). The use of the net worth method forces the jury to find that he was so stupid as to conceal $37,553.86 of his income on his 1947 return four months after he learned that he was under investigation. No evidence was ever offered to show how petitioner could have possibly concealed such a large sum from profits from the small tailoring shop. It is truly inconceivable.

CONCLUSION

Petitioner respectfully represents that the "unfortunate" and erroneous instruction to "compromise and adjust your differences" did mislead the jury, and that such "error" could not be waived by counsel. The use of the net worth method was less substantiated by the evidence in *Friedberg* than it was in *Calderon*, wherein this Court held that Calderon could *not* be convicted under that method. A rehearing should be granted.

Robert N. Gorman,
Stanley A. Silverstein,
James W. Hengelbrok,
Attorneys for Petitioner,
808 Traction Building,
Cincinnati 2, Ohio.

CERTIFICATE

I, Robert N. Gorman, one of the attorneys for petitioner, hereby certify that this petition for rehearing is presented in good faith and not for the purpose of delay.

ROBERT N. GORMAN,
Counsel for Petitioner.